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August 20, 1999

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445-12th Street, NW, Room TWB204
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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FEDERAL COMMUNICATIONS COMMISSION
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RE: Notice of Ex Parte Contact
Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98

Dear Ms. Roman Salas:

On Thursday August 19, 1999, the attached document was provided to Lawrence Strickling, Chief of the Commission's Common Carrier Bureau.

Two copies of this Notice are being submitted to the Secretary of the FCC.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert W. Quinn, Jr.", with a stylized flourish at the end.



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Director - Federal Government Affairs

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. Lawrence Strickling
Chief Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW Room TWB-204
Washington, DC 20554

Re: Notice of Written ExParte Meeting
Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98

Dear Mr. Strickling,

In several recent ex partes filed with the Commission in the aforementioned docket, Incumbent Local Exchange Carriers ("ILECs") have asserted that the Commission should not require ILECs to unbundle local switching for: (a) certain business customers; (b) in the top 50 or 100 MSAs. In addition, the ILEC community has also objected to providing an element which combines the loop and transport unbundled network elements that could be used by CLECs to provide *any* telecommunications service, including exchange access. Instead the ILECs have argued that the Commission could legally impose a use restriction on the provision of unbundled transport that would prohibit CLECs from purchasing transport as a UNE unless the particular CLEC was also provisioning local service to its end user customer. In the attachment to this letter, AT&T refutes the legal arguments presented by the ILECs on the legality of a use restriction. In this letter, we respond to factual assertions made by the ILECs and discuss practical implications on the CLEC community and competition in general, if the Commission adopted the ILEC arguments.

AT&T has articulated in its Initial and Reply Comments in this proceeding that the Commission should follow several principles in reaching a determination resolving the Supreme Court's limited remand of this proceeding:

- National rules for UNEs are required and the final decision on whether a particular element must be unbundled, now or in the future, cannot be delegated to the states.
- The national list of UNEs created by application of an appropriate Necessary & Impair standard must be based upon current market

conditions, not a prediction of what the market might look like in 3 or 5 or 10 years.

- Local competition, at best, exists for only niche markets. Adopting rules that address conditions for localized areas or for specific customer groups reduces the ability of a CLEC to enter on a nationwide basis.
- UNEs cannot be viewed in isolation. By definition, they are only "elements" used in the provision of a service; thus, practical use considerations must be factored into the ultimate decision. The Commission must employ a test that examines whether a CLEC is impaired in providing service with the UNE compared to doing so without the UNE.
- Any CLEC must have the opportunity to provide any telecommunications service through UNEs, including local service or exchange access. In addition, ILECs should not be permitted to regulate competitive entry by making UNEs unavailable or more expensive based on the particular customer or class of customers that the CLEC intends to serve.
- The only basis for not requiring ILECs to unbundle elements, or for later removing that requirement with respect to a particular UNE, is a finding that substitutes are available at comparable levels of cost, quality and timeliness and in sufficient quantities to support consumer demand.
- The availability of Unbundled Local Switching ("ULS") is the only current mechanism holding out the promise of mass-market competition.

The ILECs would apparently like the Commission to consider limiting the availability of unbundled local switching ("ULS") in certain markets (e.g., the top 100 MSAs) to residential customers and, if at all, to some aspect of the very small business customer segment measured by a limited number of access lines (although it is not clear whether that limitation would apply on a per customer or per location basis). Any "test" employed by the Commission which differentiates whether an ILEC must provide ULS based on the class of customer to whom the CLEC intends to sell the service is inconsistent with the requirements of the provisions Telecommunications Act of 1996. Moreover, the ILEC proposals with respect to ULS violate several of the principles enunciated above. The distinctions proposed by the ILECs, whether drawn as a business versus residence split or based on a number of lines (or a combination of both of those distinctions), have little to do with the factors that really impair CLECs in providing telecommunications services to end users. The critical factors relate principally to the economic circumstances and operational difficulties that arise from the fact that CLECs do not possess the already existing network ubiquity and benefits derived from the economies of scale and scope that the ILEC networks provide.

As explained in more detail in AT&T's Comments previously submitted in this proceeding, the principal economic gating factors which impair CLECs' ability to serve the mass market with UNE loops are the costs of: (a) disconnecting each individual loop from the existing ILEC switch and manually connecting that facility to the CLEC collocation cage; and (b) providing transport between those loops and the CLEC switching facility. Both of those costs, by definition, are generally not incurred by the ILEC when it provides service to its customers, because those loops are already located in the ILEC central office (and thus the ILEC does not incur a "transport" cost to move that traffic to its switch) and most of those facilities are already wired to the ILEC facilities (thus there is little to no manual central office work required to connect those facilities).¹ On the operational side, the principal limitation has been and continues to be the ILEC inability to manually provision the loops to requesting carriers at significant volumes -- let alone volumes that would be achieved in any kind of competitive mass offering. See AT&T Initial Comments at pp. 100-108; Ex Parte Letter From Robert W. Quinn, Jr. to Magalie Roman Salas dated August 18, 1999 and attachments ("AT&T Ex Parte").

Neither the economic or operational impairments are addressed by the ILEC proposals. First, whether the particular customer bears the label "business customer" or "residence customer" does not affect the transport costs. The important considerations that bear on transport costs are the proximity of the CLEC to the ILEC switch and the amount of traffic the CLEC can route over the particular facility. As described in AT&T's Initial Comments, transporting loops from a CLEC collocation cage to a nearby CLEC switch, using a DS1 transport facility and assuming all 24 channels of that circuit are utilized, can add nearly \$5.00 per line per month to CLEC costs -- all costs which the ILEC will never incur. If the CLEC switch is farther away or if the transport circuit is not being fully utilized (and as explained in AT&T's Comments, CLECs lack the data necessary to be able to properly assess the optimal utilization on transport circuits), those costs can increase significantly. Nor does it matter whether the CLEC customer is ordering one line from the CLEC or five lines or ten lines.

In addition to all of these additional costs that would be borne by CLECs, the record here is replete with evidence that ILECs simply cannot provision the loops necessary to support mass-market entry. As explained in more detail in AT&T's Initial Comments (at pp.100-105), ILECs have not demonstrated any ability to provision loops at commercial volumes. Indeed, the evidence to date shows that even with very low volumes of orders significant percentages of customers experience service outages and delays when manual processes are used to move customers from the incumbent to a CLEC. See also, AT&T Ex Parte.

¹ Other economic factors identified in AT&T's Comments include the cost of deploying a local switch as well as the cost of collocating in ILEC central offices. See AT&T Initial Comments at pp. 86-108. On top of those costs are additional non-recurring charges that ILECs have begun to impose over and above standard inflated nonrecurring charges to "coordinate" the hot cut provisioning process between the CLEC and the ILEC. See Ex Parte letter from Steve Agostino on behalf of the Competitive Telecommunications Association ("Comptel") to Magalie Roman Salas dated August 6, 1999 and attachments. These include the pre-testing of ILEC facilities, which is designed to help alleviate the chronic out-of-service conditions that have resulted from the existing ineffectual ILEC loop cutover processes. See, e.g., Ex Parte Letter and Attachments from Robert W. Quinn, Jr. to Magalie Roman Salas dated August 18, 1999.

Furthermore, even if a limitation were crafted that would eliminate the availability of ULS where the CLEC is purchasing a DS1 loop facility (minimizing *some* of the transport cost disadvantages discussed above)², the ILEC proposal to apply that limitation to the top 100 or top 50 MSAs is untenable and not supported by their own evidence filed in this proceeding. In USTA's so-called "UNE Fact Report," the ILECs state that based on 1999 LERG information, AT&T (one of the largest facilities-based CLECs in the country) has 60 local switches (including six ACC switches).³ The switches represented there are located in roughly 35 MSAs. That report also reflects that AT&T has more than one switch deployed in only 7 MSAs.⁴ If the ILECs' proposal (top 100 MSAs) were adopted, AT&T would be precluded from providing local service to large business customers via one of its local switches in 65 MSAs until it could deploy switching facilities in those markets (as well as interconnecting to each of the ILEC switches). In an additional 28 markets, AT&T would have a single local switch available to provide local service to large business customers. Contrast that scenario with the looming prospect that a combined SBC/Ameritech/SNET entity would have deployed in excess of 1800 switches serving 44 of the top 100 MSAs and that the combined Bell Atlantic/GTE entity would have deployed over 2100 switches located in over 75 of the Top 100 MSAs.⁵ It should be clear from that grim picture that limiting any entry strategy in any market is unwarranted given the competitive landscape that exists today.

What does that mean to AT&T's ability to compete to serve that market segment? In the Dallas MSA, the ILEC evidence shows that AT&T has one local switch deployed. By contrast, the ILECs serving that area have 125 switches deployed in that MSA,

² In addition, for several reasons, the "Hot Cut" issues associated with moving analog loops from the ILEC to a CLEC collocation cage are not as prevalent when DS1 circuits are deployed. First, even where the ILEC provisions a DS1 circuit to an end user, the ILEC must employ similar manual processes as the CLEC, somewhat alleviating parity concerns (assuming that the rates charged for those manual processes are compliant with TELRIC principles and assuming that the ILEC does not favor itself in the provisioning process). Second, due to the sophisticated nature of the equipment deployed (including some redundancy capability) at the customer premise and the fact that generally we are not using the same facility used by the ILEC to serve the customer, these circuits can generally be pre-tested meaning they can be moved or activated without fear of a service disruption.

³ The Fact Report also lists 34 4ESS switches which AT&T primarily uses to provide long distance services to its customers. These switches are also utilized to provide AT&T Digital Link local service to its large customers. Even if AT&T had the spare capacity to provide widespread local service using its long distance switches, the minimum connection into the 4ESS is at the DS1 level. Quite simply, those switches cannot be used to terminate analog lines.

⁴ That data is slightly out-of-date. AT&T is currently in process of having local switches deployed in 58 of the top 100 MSAs by year-end 1999. However, AT&T will have more than one local switch deployed in only fifteen of those top 100 MSAs. In 43 of the Top 100 MSAs, AT&T will have a single local switch.

⁵ Based on BLR Data's 1997 Wire Center Premium Package. Indeed, the ILECs have argued that their respective mergers are the *only* way they will establish a national footprint, rather than simultaneously in markets across the country building networks as CLECs are relegated to doing. Specifically, in explaining its merger, James Kahan, SBC Senior Vice President, testified before the Ohio Public Utility Commission that:

...what I am telling you is we're not going to go into a de novo entry to evolve into a national company. It would be a death march.

including 73 local switches deployed by the proposed SBC/Ameritech entity and 52 switches deployed by the proposed GTE/Bell Atlantic entity. The average airline mileage between AT&T's switch and the ILEC switches in that MSA is approximately 19.53 miles. That computes to almost 2500 miles of transport expense not borne by the entrenched incumbents, and the additional costs to obtain such facilities will limit AT&T to being able to efficiently serve only the largest customers in that market. The impact on smaller carriers will be even more devastating. The Top 100 MSAs and, indeed, even the Top 50 MSAs is clearly much too broad an area to limit the availability of ULS, given the evidence in this proceeding.

In addition, the Commission must ensure that if it limits the availability of ULS in any way, it puts in place a set of conditions that ensures that CLECs will have the capability to utilize their own switches to provide telecommunications services to their end user customers, including the ability to obtain non-discriminatory support for and access to the following:

Availability of Other Elements

- Unbundled local loops, including but not limited to analog loops, DS1 loops, DS3 loops, DSL-capable loops and DSL-equipped loops even where the ILEC is not obligated to provide ULS. The ability to employ self-provisioned or alternately supplied switching is highly contingent upon access to the loop UNE, regardless of the type of loop. In addition, when provisioning a DS1 loop, the ILECs must provision those facilities in the same manner as they currently provision access facilities, including providing access to inside wire where necessary and providing the capability for multi-line testing, remote maintenance and trouble administration. See AT&T Ex Parte, Affidavit of Sarah DeYoung and Eva Fettig at pp. 22-27. The record is replete with evidence regarding the limited availability of loops as a general matter and the difficulty in obtaining cost-effective and timely rights of way and building access.
- As part of complying with loop unbundling obligations, the ILEC seeking any waiver of a ULS requirement must affirmatively demonstrate that it provides TELRIC-based pricing for multiplexing and concentration functionality regardless of whether or not the CLEC possesses collocation space within the office where the ULS waiver applies, and regardless of whether the CLEC seeks to interconnect that functionality with its own facilities, other unbundled elements of the incumbent or access services of the incumbent.
- Unbundled dedicated local transport (UDLT) must be available, including multiplexing functionality at the choice of the CLEC and without limitation to bandwidth capacity, from the ILEC seeking a waiver for ULS delivery. Specifically, UDLT must be currently available at all offices where the ULS waiver is sought. Comments in the SFNPRM in 96-98 demonstrate that the CLECs would be impaired by a lack of access to UDLT due to their limited ability to achieve economies of scale and due to substantial barriers to entry caused by ROW issues. Furthermore, UDLT

is integral to the CLECs' ability to extend loops from the ILEC office to a CLEC switch and to establish efficient interoffice connectivity. Thus, without access to UDLT, the CLECs' ability to practically employ switching alternatives to the ILEC is seriously impaired and the existence of competitive switching alternatives is largely rendered moot.

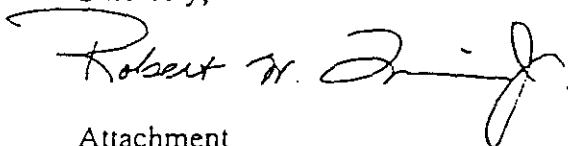
Operational Considerations

- A finding that ULS unbundling obligations may be waived requires that specific operational considerations be addressed in order to reach a conclusion that such a waiver would be pro-competitive and in the public interest. To permit otherwise would deny consumers the benefits of widespread competition (due to operational deficiencies of the incumbent). Accordingly, a waiver for ULS should not be granted unless the ILEC demonstrates the following to the Commission:
 - The capability to perform hot cuts, within the office(s) where a waiver is sought, in the time frames and volumes and with the accuracy that permits competition to develop. ILECs should be required to establish performance measurements and provide independently audited results that monitor the following aspects of hot cut performance:
 - number of hot cuts not working as initially provisioned
 - service loss from early cuts
 - service loss from late cuts
 - mean time to restore (newly cut over loops)
 - capability to handle a minimum volume of hot cuts consistent with potential CLEC demand under fully competitive market conditions
 - Operational compliance with the FCC decisions in docket 98-147 as it relates to collocation. At a minimum, for the geographic locations where ULS is not provided pursuant to Commission Rules, the ILEC must submit tariff(s) containing state approved TELRIC prices found, though a regulatory proceeding open to all interested parties, to be compliant with FCC and state rules applicable to collocation.
 - Self-enforcing consequences sufficient to encourage preventive steps to avoid performance degradation and to encourage prompt correction of performance failures, with performance failures established based upon quantitative comparison of measured performance to pro-competitive standards. This requirement applies with respect to both collocation and hot cut provisioning.
- CLECs must, consistent with the law, be permitted to use UNEs to provide any telecommunications service, including local service and/or exchange access service as well as to interconnect access services and unbundled elements. The incumbent must be prohibited from imposing any restrictions upon the use of unbundled network elements. In addition, OSS interfaces and performance for pre-order, ordering, provisioning, maintenance and repair, and billing with respect to loop/transport

combinations must be provided at a level at least comparable to what is provided by the ILEC for comparable special access services. ILECs must not be permitted to impose requirements that primarily have the effect of making it operationally more difficult to procure UNEs than similar access circuits or to convert existing special access services to UNEs.

- CLECs must not be restricted from employing access services or UNE functionality to support delivery of mixed local/access services. For example, a CLEC must be permitted to obtain multiplexing functionality, whether from an access tariff or pursuant to interconnection agreement, and then subsequently place either access services, interconnected UNEs or both onto the multiplexing functionality.
- Regardless of the type of office or the number of lines employed by a CLEC to serve a retail customer in that office, the CLEC must be permitted to utilize UNE functionality necessary to assure the health and safety of its retail customers in a manner substantially similar to what the incumbent affords its own customers. For example, despite the fact that a ULS waiver may exist for an incumbent's office, a CLEC must have reasonable access to 911/E-911 services for all its retail customers in that office. Public interest dictates that this Commission not permits a restrictive interpretation of a waiver of ULS obligations to endanger public health and safety.

Sincerely,



Attachment

cc:

Jake Jennings
Bill Bailey
Linda Kinney
Dorothy Attwood
Sarah Whitesell
Kyle Dixon

Use Restrictions On Extended Loops

This memorandum responds to the *ex parte* submissions filed by SBC Telecommunications Inc. and BellSouth Corporation (collectively "the BOCs") concerning whether competitive local exchange carriers ("CLECs") may purchase "extended loops" solely to provide exchange access.¹ The BOCs concede that the Telecommunications Act of 1996 ("the Act") allows CLECs to purchase network elements at cost-based rates to "provide any telecommunications service," which includes access service.² The BOCs nonetheless maintain that the Commission has the authority to permit incumbent LECs to deny a CLEC access to extended loops when the CLEC would use those loops to provide access to customers for whom it is not the local service provider, and that it would be in the public interest for the Commission to do so. Further, while characterizing their requested restriction as an "interim" rule, the BOCs propose no fixed termination date for the rule and suggest that it would "last for a number of years" (SBC *ex parte* at 9) -- at least until the Commission completes access charge reform and universal service reform. As set forth below, the restriction advocated by the BOCs would be contrary to the Act, prior Commission precedent interpreting the Act, and sound public policy.

1. Section 251(c)(3) imposes upon incumbent LECs:

the duty to provide, *to any requesting carrier for the provision of a telecommunications service*, nondiscriminatory access to network elements on an unbundled bases at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

¹ See August 9, 1999 letter from William Barfield to Lawrence Strickling ("BellSouth *ex parte*"); August 11, 1999 letter from Martin Grambow to Lawrence Strickling ("SBC *ex parte*").

² See SBC *ex parte* at 2; Bell South *ex parte* at 2 n.1.

47 U.S.C. § 251(c)(3) (emphasis added). As the Commission recognized in its *Local Competition Order*,³ the “plain meaning” of Section 251(c)(3) “compel[s]” the conclusion that carriers may use network elements “for the purpose of providing exchange access to themselves in order to provide interexchange services to customers.”⁴ Moreover, that right may not be conditioned on the CLEC becoming a customer’s local service provider because, as the Commission likewise held, “the plain language of Section 251(c)(3) does not obligate carriers purchasing access to network elements to provide all services that an unbundled element is capable of providing or that are typically provided over that element,” and, indeed, “Section 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements.”⁵ Incumbent LECs therefore “*may not impose restrictions* upon the uses to which requesting carriers put such network elements.”⁶ The Commission underscored its holding by observing that “there is no statutory basis by which we could reach a different conclusion,”⁷ because the statutory language is “not ambiguous.”⁸

Furthermore, based upon this plain language reading of Section 251(c)(3), the Commission also promulgated a number of regulations that prohibit incumbent LECs from restricting in any manner the types of telecommunications services that competitive LECs can provide using network

³ First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996).

⁴ See *id.* ¶ 356.

⁵ See *id.* ¶ 264.

⁶ See *id.* ¶ 27 (emphasis added).

⁷ See *id.* ¶ 356.

⁸ See *id.* ¶ 359.

elements. Thus, for example, Rule 51.307(c) requires incumbent LECs to provide network elements “in a manner that allows the requesting carrier to provide any telecommunications service that can be offered by means of that network element”;⁹ Rule 51.309(a) forbids the incumbent LEC from imposing any “limitations, restrictions, or requirements on . . . the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting carrier intends”;¹⁰ and Rule 51.309(b) provides that “[a] telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers.”¹¹

These interpretations and prohibitions follow naturally from the nature of network elements and foreclose the rule that the BOCs now seek. “[W]hen interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access ‘service’” or any other particular “service.”¹² Rather, they are purchasing access to a functionality that, when combined with other elements and/or functionalities, can be used to provide a service. Once access to an element is purchased, that element can be used by the CLEC at its and its customer’s discretion to provide any service the element is capable of supporting. The Commission has recognized precisely this point.

⁹ See 47 C.F.R. § 51.307(c).

¹⁰ See 47 C.F.R. § 51.309(a).

¹¹ See 47 C.F.R. § 51.309(b).

¹² See *Local Competition Order* ¶ 358.

“[N]etwork elements are defined by facilities or their functionalities or capabilities, and thus, cannot be defined as specific services.”¹³

Because Section 251(c)(3) unambiguously grants any “telecommunications carrier” the right to use network elements to provide any “telecommunications service,” the Commission could not reverse its prior determinations and authorize the use restriction the BOCs seek to impose.

2. The BOCs rely on a variety of other provisions and statements for their claim that the Commission has the authority to adopt their proposed rule, but none of these arguments withstand scrutiny. For example, the BOCs rely upon the Commission’s prior statements that unbundled local loops and switching cannot feasibly be used to provide access services by any carrier other than the end user’s local carrier.¹⁴ But those statements provide no support for their position -- and, indeed, they refute it. In these orders, the Commission did not authorize incumbent LECs to impose a restriction (or impose one itself), but instead merely noted a practical reality: that a carrier which obtains the right to use the local loop or switching element cannot use those facilities to provide only exchange access, because if it did so, the end user would not be able to obtain local exchange services.¹⁵ As the Commission thus explained in its *Shared Transport Order*,¹⁶ “we did not

¹³ See *Local Competition Order* ¶ 264.

¹⁴ See *BellSouth ex parte* at 4-5 (citing *Local Competition Order* ¶¶ 356-67; Order on Reconsideration, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 13042, ¶¶ 10-13 (1996) (“*Order on Reconsideration*”)).

¹⁵ See *Local Competition Order* ¶ 357 (“[C]arriers purchase rights to exclusive use of unbundled loop elements, and thus, . . . such carriers, as a practical matter, will have to provide whatever services are requested by the customers to whom those loops are dedicated. . . . That is, interexchange carriers purchasing unbundled loops will most often not be able to provide solely interexchange services over those loops.”); *Order on Reconsideration* ¶ 13 (because the unbundled switch includes a dedicated line card, “as a practical matter, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service (continued...)”).

condition use of network elements on the requesting carrier's provision of local exchange service to the end-user customer" but instead "recognized . . . that, as a practical matter, a requesting carrier using certain network elements would be unlikely to obtain customer unless it offered local exchange services as well as exchange access service over those network elements."¹⁷

The BOCs' reliance on Section 251(g) of the Act, 47 U.S.C. § 251(g) is likewise inapposite. According to the BOCs (SBC *ex parte* at 6), use of network elements solely to provide access would be a "violation" of Section 251(g), which requires incumbent LECs to "provide exchange access, information access, and exchange services for such access to interexchange carriers . . . in accordance with the same equal access and nondiscrimination interconnection restrictions and obligations (including receipt of compensation) that [applied prior to the Act]." But, as the Commission explained, "the primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent."¹⁸ The Commission further found that Section 251(g) "does not apply to the exchange access 'service' requesting carriers may provide themselves or others when purchasing unbundled elements."¹⁹ Section 251(g) is therefore irrelevant.²⁰

¹⁵ (...continued)
to an interexchange carrier").

¹⁶ Third Order on Reconsideration and Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd. 12460 (1997).

¹⁷ *See id.* ¶ 60.

¹⁸ *See Local Competition Order* ¶ 362.

¹⁹ *See id.* Indeed, if the BOCs' argument were valid, there is no apparent reason why it would not
(continued...)

The BOCs also claim that the Commission can authorize network element use restrictions that are otherwise in violation of the Act when they are only “interim” in nature (BellSouth *ex parte* at 3-4; SBC *ex parte* at 8-9). According to the BOCs, the Eighth Circuit’s decision in *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (“*CompTel*”) establishes such power. That is wrong.

In *CompTel*, the Eighth Circuit upheld the Commission’s decision in the *Local Competition Order* to allow incumbent LECs to impose certain access charges on users of unbundled switching until June 30, 1997. While the Commission recognized in the *Local Competition Order* that the Act required it to move “access charges to more cost-based and economically efficient levels,” at the time it issued the *Order* it perceived a conflict arising out of the disparate statutory deadlines for local competition and universal service rules -- specifically, that the Commission was required to adopt its local competition rules before it had even begun to consider universal service issues, and the Commission would not be able to adopt any of the universal service regulations required by Section 254 of the Act, 47 U.S.C. § 254, until May 1997.²¹ Accordingly, the Commission “adopt[ed] a narrowly-focused 10-month transition rule that permitted the imposition of certain interstate access charges on the sale of [network elements] in order to sustain, during a period of uncertainty accompanying the initial implementation of the 1996 Act, the contributions that access charges

¹⁹ (...continued)

also be unlawful for competitive LECs to use network elements to provide exchange access even where they also provide local service. The Commission, however, has squarely rejected this interpretation of Section 251(g). *Local Competition Order* ¶ 362.

²⁰ Nor can 47 U.S.C. § 154(i) supply the missing authority (*see* Bell South *ex parte* at 3), for that provision only authorizes rules that are “not inconsistent with the Act.”

²¹ *See Local Competition Order* ¶ 716.

traditionally have made to universal service subsidies.”²² The court in *CompTel* found it “significant to our review for unlawfulness that the CCLC and TIC being assessed may be collected no later than June 30, 1997,” and upheld the Commission’s transitional relief only because of its “brief life.”²³

Both the Commission (in its defense of the transitional rule) and the Court (in upholding it) emphasized that this was a highly limited exception to otherwise applicable statutory requirements that was permissible only because of its fixed and short duration and the specific exigency to which it responded during the initial period in which the Act was being implemented. The contrast between that transitional rule and the “interim” rule requested by the BOCs here could not be more stark, for the BOCs propose here a far more extensive limitation in order to address a situation does not remotely present the concerns that led the Commission to adopt a transitional rule in 1996. To begin with, the BOCs proposed rule would not have a “brief life” but an apparently long and indefinite one -- based on precisely the rationale that the Commission rejected in the transitional rule upheld in *CompTel*. Specifically, the Commission in the *Local Competition Order* rejected the requests of several parties, including BellSouth, for “interim” relief that would last until the Commission had completed both its access and universal service reform proceedings:

We can conceive of no circumstances under which the requirement that certain entrants pay [access charges] on calls carried over unbundled network elements would be extended further. The fact that access or universal service reform have not been completed by that date would not be a sufficient justifications, nor would any actual or asserted harm to the financial status of the incumbent LECs. By June 30, 1997, the industry will have sufficient time to plan for and adjust to potential revenue shifts that may result from competitive entry.²⁴

²² Brief for Respondents Federal Communications Commission and United States of America, *Iowa Utils. Bd. v. FCC*, No. 96-3321, at 50 (8th Cir. Sep. 17, 1999).

²³ See *CompTel*, 117 F.3d at 1073-75.

²⁴ See *Local Competition Order* ¶ 725.

Accordingly, even though the Commission had not completed its universal service and access charge reform by June 30, 1997, it nonetheless terminated the transitional access charge mechanism -- and the Eighth Circuit then rejected the claims advanced by several incumbent LECs, including these BOCs, that they should be permitted to continue to recover access charges and purported universal service subsidies in connection with the sale of network elements until a new, explicit universal service system is fully operational. *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 540-541 (8th Cir. 1998).

Further, we are no longer at the initial stages of implementation of the Act, and, contrary to the BOCs' claims,²⁵ there is in any event no conceivable basis for believing that universal service would be threatened without the proposed restriction. Extended loops could displace not switched access (which was at issue in the transitional rule adopted in the *Local Competition Order* permitting limited imposition of the TIC and CCLC). Instead, it could only substitute for special access, and special access, by contrast, does not include the access charges that have been regarded as providing the principal subsidy for incumbent LECs.²⁶ To the contrary, it is well-established Commission policy that "special access will not subsidize other services" and therefore special access services are not a legitimate source of universal service support.²⁷ Indeed, the BOCs themselves claim that special access is highly competitive (*BellSouth ex parte* at 2; *SBC ex parte* at 6), and if that is so, these services cannot provide universal service subsidies because it is axiomatic that effective competition drives rates towards forward-looking, economic costs.

²⁵ Cf. *BellSouth ex parte* at 6-7; *SBC ex parte* at 4-5.

²⁶ See First Report and Order, *Access Charge Reform*, CC Docket No. 96-262, *et seq.*, ¶¶ 400-02. (FCC May 16, 1997) ("*Access Reform Order*").

²⁷ See *id.* ¶ 404 (emphasis added).

Moreover, in the near term AT&T would be able to use extended loops to serve only a small fraction of even its special access requirements. AT&T and other large interexchange carriers currently have long term arrangements in place governing the purchase of quantities of the DS1-based special access facilities purchased from the incumbent LECs subject to early termination penalties that the incumbent LECs will no doubt invoke if AT&T or any other interexchange carrier were to convert existing circuits to network elements. Thus, even if there were some connection between special access and universal service, use of extended loops in accordance with the Act's terms would not have a significant impact on the incumbents because there could be no "flash cut" to using network elements for access.

3. Finally, the BOCs argue that the prohibition they seek to impose should be regarded as a "just and reasonable" "term" or "condition" of providing access to UNEs, and thus permitted by Section 251(c)(3). That is manifest nonsense. A restriction that is contrary to Section 251(c)(3) cannot be considered "just" or "reasonable." Section 251(c)(3) underscores this point by making clear that the "terms" and "conditions" of access must be "just, reasonable, and nondiscriminatory *in accordance with . . . the requirements of this section.*"

But even if that were not dispositive, the BOCs' policy claims that their restriction would serve the public interest would be meritless in any event. As shown above, there is no threat to universal service in the absence of the restriction, and thus no rationale for its adoption. Moreover, the rule would affirmatively disserve the public interest in two independent respects.

First, the Commission has recognized that access charges currently are not, as required by the Act, based on forward-looking, economic cost.²⁸ Rather, access charges are generally well above costs. Instead of prescribing cost-based access charges, however, the Commission decided to rely on competition to drive access charge rate levels towards costs.²⁹ In this regard, the Commission expressly relied on the availability of cost-based network elements to provide such competition.³⁰ Permitting carriers to use unbundled transport to provide competitive access services for the interexchange traffic of other providers' local exchange customers would allow carriers more quickly and broadly to use network elements to begin the process of "competing" away access rents. By contrast, restricting use of network elements in the manner the BOCs seek will reduce access competition and permit the BOCs to continue to charge supra-competitive prices for access. Contrary to SBC's suggestion (SBC *ex parte* at 6) that access competition is not a significant objective of the Act, "Congress intended the 1996 Act to promote competition for . . . exchange access services."³¹

Second and more fundamentally, the BOCs' rule would impede local exchange competition as well, for it would ensure endless disputes and litigation on a customer-by-customer basis between CLECs and the incumbents over the uses to which individual network elements may be put. In essence, by placing a use restriction on CLEC purchase of network elements, the Commission

²⁸ *Access Reform Order* ¶¶ 258-84; Seventh Report and Order and Thirteenth Order on Reconsideration, *Federal-State Joint Board on Universal Service Reform*, CC Docket No. 96-45, *et seq.*, ¶¶ 124-27 (FCC May 28, 1999).

²⁹ *Access Reform Order* ¶¶ 258-84.

³⁰ *Id.* ¶ 269.

³¹ *Local Competition Order* ¶ 361.

permits, and actually endorses, the incumbent LEC to question the CLEC regarding the services it intends to provide the customer when it purchases the particular element.³² Whether intended or not, this rule would have the practical consequence of setting up the incumbent as the initial arbiter of whether a CLEC is entitled to obtain a network element, or to unilaterally determine what terms or conditions would apply to the elements the CLECs ordered (network element-related or access-related). In addition, the proposed rule could enable the incumbent to deny access based on the incumbent's suppositions regarding how the element will be used (and to what degree it will be so used) or to demand intrusive and competitively sensitive information on the use of those facilities (by demanding audit rights, monitoring equipment or the like) from the CLEC as a precondition to providing access to a network element. That is an intolerable and untenable position in which to place a market entrant vis-a-vis its dominant competitor and would result in the same type of incumbent LEC litigation tactics that have effectively forestalled competition from developing on a broad scale since the Act passed.

³² Compounding this problem is the fact that there is nothing in the EDI-based ordering process which specifies this query. Consequently, the only way an incumbent LEC could administer that restriction would be to manually process every single order that included an extended loop element.

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JUL 15 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 15, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

RECEIVED

SEP 01 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: Notice of Ex Parte meeting
Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98

Dear Ms. Roman Salas:

On Wednesday July 14, 1999 Richard Rubin, C. Michael Pfau, and I, of AT&T, and Peter Keisler of Sidley & Austin met with Jake Jennings, Claudia Fox, Sanford Williams, Bill Sharkey, Chris Libertelli, David Kirschner, and Anthony Mastando of the Common Carrier Bureau's Policy and Program Planning Division and Jerry Stanshine of the Commission's Office of Engineering and Technology to discuss AT&T's Initial and Reply Comments filed in this docket. Attached hereto is a bullet-point summary of those comments which was distributed at and used during the meeting.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert W. Quinn, Jr.", with a stylized flourish at the end.

Attachment

cc:	J. Jennings	S. Williams
	C. Fox	D. Kirschner
	B. Sharkey	A. Mastando
	C. Libertelli	J. Stanshine

UNE Remand - Key AT&T Positions

General Principles

- National rules are critical to the development of local competition; a "presumptive" or other approach that leaves the final decision with State PUCs would result in massive litigation and delay. Thus, the Commission should look at
 - national, rather than regional opportunities to obtain substitutes and
 - the ability of CLECs in general (not specific CLECs) to obtain substitutes
- The FCC must adopt a minimum set of UNEs; States may add to, but not subtract from, the national list
- The FCC's rules must preserve all three forms of entry prescribed by the Act -- interconnection, access to UNEs (including UNE-P) and resale -- for all CLECs.
- The "impair" standard is satisfied if lack of access to a network element would materially reduce a CLEC's ability to provide a service as broadly, effectively or economically as it could if the element were available as a UNE at cost-based rates
 - This is not a simple "reduced profitability" test but one that assesses impairments of the CLECs' ability to offer competitive services
- The "necessary" standard applies only to "proprietary" elements; because the ILECs do not propose many valid cases of elements that are legitimately "proprietary," this standard is relatively unimportant here
- The "necessary" and "impair" standards must be based on evidence in today's marketplace, not some estimate of possible future CLEC capabilities
- Any review of a specific UNE must recognize that all UNEs are building blocks that are used in combination with other network elements to provide a service, regardless of who provides the other elements; thus
 - UNEs cannot be viewed in isolation
 - factors such as the costs of extending loops to CLEC switches and the ILECs' limited ability to perform hot cuts must be considered
- Combinations of UNEs are vital to support broad-based competition, especially in the mass market
- Any fixed "sunset" of UNEs would be arbitrary and unlawful; however:

— future reviews of the CLECs' need for specific UNEs are appropriate, provided any future removal of a UNE is accompanied by a reasonable transition plan

- The FCC's rules here should ensure that CLECs have an opportunity to effectively and immediately offer one-stop shopping to customers, in competition with incumbent LECs. Otherwise, CLECs' ability to provide service will have been "impaired" within the meaning of section 251(d)(2)
- Any material change in the UNE list developed in the First Report and Order will require a significant reassessment of the FCC's 271 requirements and access reform rules

Specific UNEs

- Except for standalone signaling and OS/DA (when customized routing and access to ILEC DA data are available), all of the original UNEs identified by the FCC are needed at this time to permit CLECs an opportunity to compete effectively, especially for mass market customers
- The current definitions of the Loop and NID should be modified to ensure that CLECs have a nondiscriminatory opportunity to access the non-ILEC wires that serve customers in office buildings and MDUs
- In order to support competition for advanced services, CLECs must have access to
 - conditioned loops ("clean copper") in all cases and
 - equipped loops (i.e., loops that include DSLAM electronics) whenever they cannot effectively obtain access to a conditioned loop and when they are providing a UNE-P based service for voice customers
- In contrast, CLECs do not need access to ILEC packet switching or data transport, except insofar as they are needed solely to route data traffic to the CLEC's network
- The Commission should not require line sharing

1. The FCC Should Adopt National Unbundling Rules, Not Merely Guidelines

The FCC's tentative conclusion to adopt national unbundling rules is clearly correct

The plain terms of the Act contemplate that the FCC will determine which UNEs will be made available

The Supreme Court did not criticize the First Report & Order for adopting national definitions of UNEs

- The Court only required the FCC to apply a proper test of the "necessary and impair" requirements of section 251(d)(2); it did not criticize the Commission's application of its UNE rules on a national basis
- The Court's decision indicates that it *expected* the Commission to issue a list of UNEs that would be available on a national basis (e.g., it would be "surpassing strange" for a federal program to be "administered by 50 independent state agencies;" there is a "presumption" against any such scheme)

Adoption of national rules is fully consistent with the pro-competitive purposes of the Act. As the FCC found in the First Report & Order, national rules will

- Provide certainty and uniformity on a national scale; decisions that are based on the availability of alternatives in localized areas or for specific customer groups do not consider the impact of such decisions on the ability of a CLEC to enter on a nationwide basis
- Avoid interminable litigation and unnecessary costs
- Promote investment in competitive facilities

National rules are especially important to support competition in the mass market

National rules are also important to preserve the three different market entry vehicles provided for in the Act (interconnection, resale and UNE-based entry)

- The Commission has already correctly held that the Act does not create any hierarchy among entry strategies and that all three must be preserved
- There is no basis for the ILECs' claims that only rules that support facilities-based entry by CLECs deserve attention; all consumers are entitled to receive the benefits of competition as soon as possible

- There is also no basis for the ILECs' assertion that if unbundling obligations are "too broad" CLECs will seek a free ride on the ILECs' facilities; all CLECs have acknowledged that they would *prefer* to use non-ILEC alternatives if they were available in a true wholesale market

National rules are needed to promote national entry by CLECs

- No CLEC has the capital to enter on a national basis using only non-ILEC facilities
- Even facilities-based CLECs will need to lease UNEs as they enter the market

Many State PUCs (Illinois, California, Connecticut, Washington and Kentucky) support such rules

ILEC arguments that FCC should only issue "guidelines" or "presumptive rules" that must be applied on an element-by-element and market-by-market basis should be rejected, because:

- Adoption of guidelines or presumptions will undo all the benefits of national rules and enable ILECs to engage in an endless stream of litigation over their UNE obligations
- Such litigation would likely lead to inconsistent results, even in neighboring states, based on differing regulatory philosophies rather than different facts (compare Illinois and Ohio PUCs' views)
- ILEC data regarding differences in current deployment/availability of substitutes for UNEs is, in many ways, inaccurate or misleading
- Even if the ILEC data were taken at face value, they at best show limited options are available to CLECs in limited circumstances, and that CLECs generally do not have viable substitutes for ILEC UNEs

2. Federal and State Roles in Identifying and Removing UNEs

Unlike other portions of the Act, section 251(d)(2) unambiguously requires "the Commission" -- not the States -- to make the determinations under the "necessary and impair" test

Section 251(d)(1) also directs the Commission to make such determinations in a nationwide rulemaking proceeding that is binding on the States in arbitrations (see section 252(c))

Thus, the Commission should not, and may not, defer its duty to decide minimum national unbundling rules to the States

Similarly, because the Commission is vested with the authority under section 251(d)(2), it, and not the States, must decide if (and when and under what circumstances) any UNE may be removed from the national list; otherwise, all the benefits of national rules could be lost.

The Commission properly has indicated that it will adopt *minimum* national rules regarding unbundling; thus, PUCs are not precluded from adding to the list of UNEs, under federal law, based on the specific facts applicable to their jurisdictions

The Act also preserves the States' right to adopt pro-competitive state rules; thus, contrary to the ILECs' assertions, it does not preempt States' rights, under State law, to adopt additional unbundling requirements

- The Act does not preempt the field, leaving many areas open for the States to adopt complementary requirements (e.g., sections 261(c), 251(d)(3), 252(e)(3), 601(c)(3))
- There is clearly opportunity for States to adopt requirements that do not conflict with or frustrate Federal requirements

In cases where States have imposed additional unbundling requirements on ILECs, they should also be permitted to determine when, and under what conditions, such requirements expire

3. Definition of the "Necessary & Impair" Tests Under Section 251(d)(2)

The "Impair" Test

Because the "necessary" test of section 251(d)(2)(A) applies only to "proprietary" elements, for practical purposes, the "impair" test is the more important here

The ordinary (dictionary) meaning of "impair" is "to make worse, to diminish in quantity, value, excellence, or strength"

Thus, section 251(d)(1)(B) means that a CLEC would be "impaired" if the lack of access to a UNE would reduce its ability to provide a service as broadly, effectively or economically, and at the same level of service quality, as it could if it had access to that UNE

- This standard responds directly to the Supreme Court's decision, because it reflects a CLECs' ability to offer a service, not merely its ability to make the same profit

Consistent with this definition of "impair," in assessing whether a CLEC would be impaired by lack of access to a UNE, the Commission must consider a number of factors relating to any proposed substitute for a UNE, including:

- cost
- timeliness
- scope of service that can be offered
- service quality (as perceived by customers)

In contrast, the "impair" test cannot be interpreted to require that the Commission apply the "essential facilities" doctrine of antitrust law or other antitrust law principles, such as the DOJ/FTC Merger Guidelines, as the ILECs propose

- The plain meanings of "impair" and "essential" cannot be squared with each other; "impair" is a much less stringent term, and, contrary to ILECs' claims, there is no statutory basis for assuming that the "impair" test must be "stringent" to comply with the Act
- When applied to lawful monopolies such as those the ILECs possess, antitrust principles only place limits on monopolists' ability to *extend* their monopoly power; indeed, the essential facilities doctrine itself assumes that a monopolist will *continue* to operate its monopoly in its base market

- In contrast, the Act is expressly intended to break up the ILECs' entrenched monopolies and open local markets to competition; the ILECs' proposals would only preserve and prolong their local monopolies

It would also be incorrect to graft a "meaningful opportunity to compete" standard onto the "impair" test in the manner that many ILECs propose

- The ILECs argue that the "impair" test is not satisfied if a *single* CLEC could, within some *extended* time period (up to 2 years), profitably offer *some* service to *some* customers using alternatives to a UNE; this "one is enough" view is *not* the statutory standard: the Act envisions a broadly competitive market with multiple CLECs using any of the three entry strategies in any area
- Sections 251(d)(2) and 251(c)(3) require the Commission's analysis to be applied to *any* CLECs *current* ability to provide *any* telecommunications service it seeks to offer (We do not oppose the application of an "efficient" qualification on a CLEC)
- The overall goals of the Act further require, as the Commission held in the First Report, that the market be open to *many* CLECs using *many* different entry strategies
- Thus, the activities of a *single* CLEC (especially a hypothetical one) cannot be dispositive and foreclose other CLECs' opportunity to access UNEs

The "Necessary" Test

The "necessary" standard applies only to "proprietary" network elements

The Commission's definition of "proprietary" in the First Report is correct, i.e., it applies only to

- proprietary protocols developed specifically by the ILEC and otherwise entitled to some form of protection under intellectual property law (and not to the intellectual property of third parties) and
- certain types of proprietary information, but not information or other property acquired by virtue of the ILECs' monopoly position

If CLEC access to proprietary elements (and particularly proprietary information) is mediated, the issue is resolved and only the "impair" test need be applied

Even if mediation does not resolve issues relating to specific ILEC proprietary protocols, as some ILECs contend, CLECs are still entitled to access to such elements if it is necessary for them to compete effectively

The "necessary" test is similar to, but more stringent than, the "impair" test and is judged by application of the same criteria

The comments assert only a very few instances in which UNEs are proprietary, and in nearly every instance the claim is meritless

- Ameritech's claim that the routing tables in its switches are proprietary is not asserted by any other ILEC and is obviously makeweight -- routing tables are not the result of Ameritech's insight and acumen; rather, they are a result of the information it gained by virtue of its monopoly position -- exactly the type of asset the Act intended must be shared with CLECs
- In all events use of routing tables (but not access to the data used to create such tables) is "necessary" for CLECs that purchase unbundled switching, because those tables are integral to the operation of the switch itself, which is otherwise non-proprietary

4. Application of the "Necessary & Impair" Tests

Application of the "necessary and impair" tests must be made on the basis of the *current* facts in the marketplace and CLECs' *current* ability to obtain substitutes for ILEC UNEs and to compete using any such substitute. Any other view, such as the two year view advocated by some ILECs, would

- be speculative and
- would harm consumers by preventing CLECs from meeting current demand for competitive alternatives

In assessing whether a substitute would provide a viable option to a UNE under either test, the Commission must consider information regarding how the substitute can be integrated into a CLEC's network, because network elements, by definition, must be used in combination to provide service

- Section 251(c)(3) requires that UNEs must be provided in a manner that allows carriers to combine them to provide telecommunications service
- Section 153(45) defines a "network element" as "a facility or equipment used in the provision of a telecommunications service"
- Claims by some ILECs that UNEs must be reviewed "in isolation" under section 251(d)(2) are thus both inconsistent with the ordinary way in which network elements interact with each other and the express terms of the Act

In particular, SBC's claims in this regard are inconsistent

- On the one hand SBC claims that switching must be judged in isolation and that other costs CLECs must incur to use their own switches should be ignored
- On the other hand, SBC correctly admits that "signaling is a servant to switching"

Factors that must be considered in applying the "necessary" and "impair" tests include:

- additional equipment and other costs incurred to connect a substitute to the CLEC's network, compared to the cost of using a UNE
- additional time, labor and administrative effort needed to integrate a substitute into the CLEC's network
- other factors relating to the quality of service and scope of the planned service offering that are affected by use of a substitute

These tests are *comparative*, measuring a CLEC's ability to provide service with and without access to the unbundled element at cost-based prices

- ILEC claims that UNEs can be compared against available ILEC "services" at higher prices were properly rejected in the First Report and affirmed by the 8th Circuit

Section 251(d)(2) only requires the Commission to "consider" necessity and impairment, thus:

- the Commission is not required to accord these factors any specific, much less dispositive, weight, as long as they are duly considered; indeed, on appeal the ILECs admitted they are not dispositive
- the Supreme Court's directive to develop meaningful "limiting principles" in light of the Act's purposes entitle the Commission to consider other factors, particularly the Act's overriding purpose to promote competition in local markets
- there is no basis for ILEC claims that the "necessary" and "impair" tests create an "irreducible minimum" for the Commission here

5. CLECs Need Access to UNE Combinations, Including UNE-P

Section 251(c)(3) expressly provides that CLECs must have access to UNEs in a manner that enables them to be combined to provide services

In many circumstances, the UNE-P combination is the only means CLEC can use to serve some customer groups, especially mass market customers

The use of combinations such as UNE-P can spur competition in ways other entry strategies cannot

- In a four-month period in New York, MCI was able to provide UNE-P based service to about twice the total number of customers served by UNE-P over the last three years – even though BA-NY's OSS systems are not yet fully operational

CLECs also need ILECs to combine UNEs for them

- Rule 315(b) requires ILECs to provide combinations of UNEs they "currently combine;" this should include cases in which a CLEC requests a "new" loop as part of a UNE-P combination
- As a matter of simple non-discrimination ILECs must provide CLECs with all combinations they actually use to provide service to customers; this clearly covers the "new loop" situation described above
- The 8th Circuit's rationale for vacating Rules 315(c)-(f) was completely undermined by the Supreme Court's holding that "unbundling" refers only to separate pricing, not physical separation of elements
- The 8th Circuit's assumption that ILECs would prefer to have CLECs combine UNEs rather than do it themselves has been refuted by the ILECs' consistent refusals to permit access to their equipment so that CLECs to do so in an efficient manner
- Thus, the Commission should reinstate Rules 315(c)-(f), as well as Rules 305(a)(4) and 311(c) permitting CLECs to request (at rates that will reimburse ILECs for their costs) superior quality access and interconnection

6. Cable Telephony Will Not Eliminate the Need for UNE-P

Contrary to ILEC claims, the emergence of cable telephony cannot eliminate the need for UNE-P

Cable telephony is just emerging as a technological capability, is only being trialed in limited market areas and will take significant time and investment to implement – at least several years

Customer acceptance of cable telephony will also take time

The availability of UNE-P will not create disincentives for cable telephony, but rather is a stepping stone to this and other forms of facilities-based competition, where such competition is otherwise economically feasible

At best, the entry of a cable telephony provider only creates a single competitor in an area; the Act, in contrast, requires that local markets be open to multiple providers using all three market entry strategies provided for in the Act

The emergence of one cable telephony provider in an area does not demonstrate that *other* CLECs' ability to provide service is not impaired; thus, it is not a sufficient reason to deny other CLECs access to UNEs

Moreover, cable providers are not ubiquitous; their footprints limit their ability to provide service outside their cable territories; thus, even CLECs that offer cable-based telephony in some areas need alternatives in areas where they do not have cable properties

7. "Sunset" Provisions Are Arbitrary and Should Be Rejected

Contrary to the ILECs' arguments, there is no reason to establish a firm "sunset" date by which the Commission's rules here will expire

Establishment of any date certain simply provides ILECs with an incentive to slow roll CLEC requests for UNEs

A period of certainty is needed to foster competition

There is no reason to believe at this time that the CLECs' need for access to any UNE or UNEs will "expire" at a date certain; indeed, any such assumption would be inherently arbitrary

Given the dynamic nature of the industry, it would be appropriate for the Commission to review and possibly revise the unbundling rules after a reasonable period, e.g., three years

- Note however, that the only basis for removing a UNE is that substitutes are available at comparable levels of cost, quality and timeliness and in sufficient quantities to support consumer demand (e.g., if a truly competitive wholesale market developed)
- Thus, the Commission's rules should not be revised until they are no longer commercially necessary because the market has developed interchangeable alternatives to ILEC UNEs; at such time, the UNE requirements would be superfluous, and CLECs would not be relying upon them

In order to avoid customer and market disruption, any decision to remove a UNE from the minimum Federal list (or any additional UNEs required by States under Federal or State law) should incorporate a reasonable transition plan for customers being served by a "retired" UNE

8. Material Changes in the Prior UNE Unbundling Rules Would Require Substantial Alteration to Current FCC Requirements

Many of the Commission's decisions since 1996, particularly its decisions relating to BOC 271 applications and access reform, have relied on the assumption that unbundled elements would be broadly available to CLECs, both individually and in combination

Material changes in the Commission's prior unbundling rules would thus require substantial changes in the Commission's section 271 review and access rules

The First Report correctly held that:

- the Act's primary goal was to open the local market to competition
- CLECs are entitled to use any of the three entry vehicles provided for in the Act
- the Act creates no hierarchy of entry vehicles and
- CLECs can be expected to use a variety of vehicles, either in the same or different geographic areas

The Commission's section 271 decisions have required that a BOC demonstrate that its local market is "irreversibly open to competition" and that CLECs have a meaningful opportunity to compete

The Commission has correctly recognized that after 271 relief BOCs will have ready access to competitive long distance facilities and the fully implemented and electronic PIC change process that will enable them to acquire millions of long distance customers very quickly

- *Indeed, in the 5 minutes it takes an ILEC to perform one "hot cut" it could acquire multiple long distance customers using the well-established PIC process*

The Commission has also interpreted the "own facilities" portion of the "facilities-based" requirement of section 271(c)(1)(A) to include CLEC use of UNEs

Thus, any decision to deprive CLECs of access to the basic UNEs they need to compete effectively with the BOCs requires a substantial retooling of the Section 271 review process; otherwise, BOCs will be able to extend their monopoly power over the local market into the competitive long distance market

The Commission's access reform rules declined to prescribe cost-based access rates on the assumption that CLECs will have widespread access to UNEs, especially local switching. The availability of UNEs was highlighted as a mechanism that would place market pressure on ILECs to drive access charges toward cost

Failure to require unbundling of UNEs (especially switching) at cost-based rates would require the Commission to take other steps to assure that ILEC access rates do not continue to significantly exceed costs, including the imposition of prescribed cost-based access rates

9. CLECs Would Be Impaired Without Universal Access to ILEC Loops and NIDs, Including Dark Fiber Loops

Virtually all commenters agree with the Commission's tentative conclusion that failure to require ILEC to unbundle loops would impair CLECs ability to compete. No party seriously refutes the fact that ILEC loops represent the quintessential monopoly element that embodies the monopolist ILECs' inherent economies of scale, scope and density

CLECs also need access to dark fiber for use as loop facilities and the ability to use ILEC multiplexing/concentration to connect loops with other UNEs

ILECs urge the Commission to carve out a large exception – loops provided to large business customers from “high density” central offices. These ILEC claims should all be rejected, because the ILEC data shows, at most, that a small proportion of buildings (15% or less) are served by CLEC loops today

Moreover, the ILECs' data is incorrect and misleading:

- The ILECs' assumption that the existence of a competitive fiber ring means that loops are readily available is rebutted by AT&T's showing that
 - Even where it has fiber rings in large cities (LA, Dallas-Ft. Worth, Orlando) it serves very few buildings on those rings (in Tampa there are zero buildings on its ring)
 - Often AT&T loops serve only particular floors of a building, not the entire building (in LA over 2/3 of the 120+ buildings on its fiber ring are only “fiber to the floor”)
- Even AT&T's own experience is that it has initially served about 80% of its high-volume customers through the use of ILEC channel terminations, not its own facilities; only later does AT&T install its own facilities in cases where it has obtained the necessary building access and a sufficient customer base to justify a full build-out
- Thus, contrary to ILEC claims, access to ILEC facilities fosters CLECs' ability to build their own facilities

The ILECs' claims also ignore the many asymmetries CLECs face in self-provisioning loops that ILECs do not currently face, including the need to obtain:

- access to rights of way, which can take many months (or even years) and be very costly to obtain, including the payment of franchise fees to municipalities

- building access from landlords, which is not provided for under the Act and is also a very costly and time consuming process to resolve -- if it can be resolved at all in a particular case

The ILECs' assumption that if one CLEC can serve a particular building other CLECs can also serve that building are also wrong, because:

- CLECs have no legal obligation to provide such facilities for others, and
- there is no evidence that CLECs will make such facilities available to others at the TELRIC rate that applies to ILEC loops

Given all of the above, there is especially no reason to believe the ILECs' grand claim: that merely because *one* CLEC provides (or *could* provide) its own loops into one building in an area that it or any *other* CLEC would not be impaired if were denied access to ILEC loops to serve *other* buildings in that same area

The Comments show from actual market experience that the Commission's loop/NID unbundling requirements should be clarified to comply with three principles:

- CLECs must have access to all the ILEC's equipment and facilities up to the privately-owned wiring at the customer's premises (including ILEC smart jacks, channel banks and other cross-connection functionality, including necessary test loop back and electrical protection). These can collectively be construed to represent the NID functionality that is necessary to enable a customer's wires to be connected to the facilities of the serving LEC
- The definition of the loop does not hinge upon the type of media used or the type of service the ILEC carries over the loop
- The termination point of the loop on the network side should be, at the CLEC's option, the physical termination and cross-connection to
 - any other ILEC UNE in the ILEC central office *or*
 - any technically feasible point of interconnection with the CLEC network where the CLEC gains access to the communications the customer places on the loop

ILECs should also be required to provide loop characteristic information to CLECs through their OSS so the CLECs can determine whether the loop can support specific types of services

ILECs should also be specifically required to provide access to NIDs and be prohibited from removing the loop terminations from them when a CLEC purchases a loop

10. CLEC Access to Unbundled Switching and Shared Transport Is Critical to Enabling CLECs to Compete Effectively in Local Markets, Especially for Mass Market Customers

CLECs' ability to offer service, especially to mass market customers, would be significantly impaired without access to the local switching element because they would face

- Significant additional costs and delays associated with extending customers' loops to their own switches that the ILECs' own evidence acknowledges would make it uneconomic for CLECs to serve at least 70% of residential customers and
- CLECs would incur delays and service quality disadvantages resulting from an overloading of the coordinated hot cut process

CLECs that deploy their own switches must incur significant delays and large expenses to extend customers' loops to their own switches, including:

- Collocation costs and delays
- Costs to deploy DLC equipment in collocations
- Hot cut loop provisioning costs (including CLEC costs for monitoring ILEC hot cut performance)
- Transport costs

None of these costs is necessary for CLECs that use unbundled switching in combination with other ILEC UNEs

Critically, ILECs incur none of the above costs to serve their local customers; moreover, after in-region interLATA entry, BOCs, unlike CLECs, would have well-established and fully automated processes available to them that would enable them to serve all long distance customers in their territory

In addition, the capital costs of deploying switches make broad scale (especially national) entry impossible for CLECs in the near term

ILECs claim that *no* CLEC is impaired if *one* CLEC might be able, over time, to deploy a switch in an area and profitably serve a small segment of customers. This argument misses the point

- The Act provides *multiple* entry vehicles that are supposed to be available so that *multiple* CLECs can offer competitive alternatives to the broadest array of customers, including customers in the mass market

ILEC data on the availability of CLEC switching is misleading (e.g., AT&T's use of 4ESS switches to serve a select segment of high end business customers does not mean that it is able to serve most customers in an area)

ILEC data also ignore the obvious: there is no significant facilities-based competition today for mass market customers

Even at face value, ILEC data show only that CLECs have installed about 4% of the switches currently used by ILECs; this hardly heralds the dawn of mass market competition in the near future

- Moreover, deployment of additional switches takes significant time (typically at least 9 months)

ILEC claims regarding the potential "reach" of CLEC switches also ignore

- that expanded reach does not expand a CLEC's total capacity and
- there are significant transport costs to serve distant customers
- even the ILECs' own experts admit that "reach" is governed more by economic than technical considerations

ILEC assertions that switching is available from other CLECs is baseless and absurd

- CLECs are not required to provide UNEs
- there is no evidence that any CLEC is making wholesale switching available at any price, much less at the ILEC's TELRIC
- using a third party switch still requires a CLEC to incur all the costs and delays associated with deploying its own switch

11. CLECs Do Not Have Adequate Substitutes for Unbundled ILEC Transport, Both Shared and Dedicated

Shared Transport

The Commission has already determined that shared transport is “particularly important” for mass market entry (Third Order on Reconsideration) because

- CLECs cannot predict in advance the location or calling patterns of their future customers
- cannot design an efficient transport network
- would face significantly higher costs and reduce competitive entry

CLECs have no substitute that would give them the equivalent of the ILECs’ advantages of scale, scope, connectivity and density

Ameritech’s last-gasp (and solitary) arguments opposing shared transport are meritless

- AIT’s statutory claim that an element must be capable of being purchased separately was flatly rejected by the Supreme Court, which recognized that “unbundled” relates to pricing, not physical separation
- AIT’s claim that its routing tables are “proprietary” is unsubstantiated and irrelevant
 - Routing tables are not the result of creativity or skill but rather sweat of the brow work needed to design its network architecture efficiently; thus they are another result of the ILECs’ economies of scale, scope and density
 - CLECs do not have access to the underlying information used to develop the routing tables; rather, they only are able to obtain the same economies as the ILEC in the use of the ILEC’s network
 - Even if they were proprietary, CLEC use of the routing tables is clearly “necessary” under the Commission’s prior findings of fact
- AIT’s claim that another “service” is available to replace shared transport violates the 8th Circuit’s ruling that ILECs may not avoid unbundling obligations by offering a service at non-cost-based prices and it is not the functional equivalent of shared transport

Dedicated Transport

The fact that *some* CLECs have been able to deploy their own dedicated transport in *some* places to serve *some* customers does not eliminate other

CLECs' need for dedicated transport as a UNE to serve other customers in other locations

CLECs also need access to dark fiber for use as transport

Transport must be made available with associated multiplexing to enable CLECs to interconnect facilities efficiently

ILEC "proof" of the availability of satisfactory alternatives to ILEC transport is rebutted by evidence from many CLEC, including AT&T, Sprint and Covad, that in *a large majority* of cases they do not have any viable alternative to ILEC transport, even in large metropolitan areas and "dense wire centers"

- ILEC data on the alleged "fiber frenzy" relates to the availability of long-haul fiber optic systems and loops, not fiber to serve *local transport* needs
- At best, ILEC data shows that ILECs control 89% of all capacity and nearly 100% of the available capacity on routes where CLECs need it

Limitations on alternatives are a result of many factors, including

- cost and delay related to facility construction – note that the economic justification for building facilities is in part a function of the ILECs' pricing umbrellas which may be reduced over time and in response to competitive activity
- cost and delay caused by the need to obtain collocation
- cost and delay caused by the inability to negotiate and obtain necessary rights of way – an increasing problem for CLECs

Availability of alternatives from non-ILEC sources is also limited because dedicated transport requires that facilities be between *specific* end points; otherwise alternative capacity, even if it exists, is useless to a CLEC

ILEC special access services are not a substitute for unbundled dedicated transport

- as a matter of law, higher priced services cannot be made a substitute for UNEs
- access prices are typically significantly higher than UNE prices – as much as 900%

12. If CLECs Have Access to Customized Routing for OS/DA and Full Access to ILEC DA Data as a UNE, OS/DA Can Be Eliminated as a UNE

Substitutes for ILEC OS/DA *services* are available; however, OS/DA service cannot be eliminated as a UNE if CLECs do not have an effective means to route OS/DA traffic from ILEC switches to the OS/DA platform that serves their customers

Customized routing through either an AIN-based or Line Class Code solution is necessary to enable CLECs to route their OS/DA traffic to alternative platforms; if such capability is demonstrated and actually available, CLECs will be able to provide their own OS/DA services

In contrast, there is no substitute for the DA data that ILECs compile and use to provide DA services; thus, ILEC DA data must be made available as a UNE at cost-based rates

- DA data qualify as a network element under the statutory definition, which specifically includes "subscriber numbers" and "databases"
- ILEC DA data are of demonstrably higher quality (i.e., more accurate and complete than any alternative), because all other sources are comparatively stale and less complete, and they are not updated with the same frequency as the ILEC DA data
- ILEC charges for access to their DA data are prohibitively expensive for CLECs that want to compete in offering such services
- Discriminatory ILEC restrictions on the use of DA data (e.g., prohibitions on use of such data for Internet-based listings) must also be eliminated

13. CLEC Access to ILEC OSS Is Critical to the Development of Local Competition

All parties, including ILECs, acknowledge the critical nature of OSS and agree that OSS must be available

However, ILEC claims that OSS is needed only to support UNEs the Commission orders them to unbundle are overstated, because CLECs need access to pre-ordering information regardless of the entry strategy they use

The comments also identify areas in which current ILEC OSS capabilities must be expanded, including the ability to:

- identify areas (and customers) served by IDLC facilities
- identify availability of xDSL capable and xDSL equipped loops to support CLEC needs relating to advanced services

14. CLECs' Ability to Compete Would Be Impaired Without Access to xDSL Conditioned Loops and, in Certain Circumstances, xDSL Equipped Loops

Even most ILECs agree that the key to CLECs' ability to provide consumers with competitive advanced services is access to the loops necessary to provide such service

The Commission has correctly determined that loops used to provide advanced services are indistinguishable from loops used to provide other telecommunications services

This principle properly applies both to

- conditioned loops and
- equipped loops (in those cases where lack of access to such loops would impair CLECs' ability to provide service)

The conditioning of loops is an ordinary activity that ILECs perform in maintaining their networks, not, as some ILECs claim a "superior service".

- Thus, ILECs must be required to provide conditioned loops for CLECs and their customers at cost-based rates, whether or not they are currently making xDSL services available to their own customers in the area the CLEC wishes to serve

Contrary to some ILECs' claims, DSLAMs are *not* separate network elements but are equipment used to condition a loop for certain purposes, just like bridge taps and repeaters

- Thus, equipped loops are no different from any other type of loop and benefit from the same economies of scale, scope and density as the ILEC's general loop plant

Nondiscriminatory access to xDSL capable loops requires that ILECs provide CLECs with:

- access to all information necessary to determine if it is possible to provide xDSL service to a specific customer, including the physical properties of the incumbent's loop and other facilities serving a customer (i.e., loop qualification information); otherwise, CLECs will not be able to market such services or respond to consumers' requests for service
- the ability to access customers using all-copper facilities, including the ability to obtain either (1) an all-copper loop to an ILEC central office that supports equal end user service quality to the existing loop or (2) the ability to collocate in or near a remote DLC terminal, including installation of a line card in the incumbent's rack

- non-preferential spectrum management and equipment qualification practices

In addition to access to cost-based conditioned loops, CLECs will not be able to compete effectively until the collocation requirements of the Commission's Advanced Services Order are fully implemented

There are also two circumstances in which CLECs ability to offer service would be impaired in the absence of access to equipped loops, i.e., loops equipped with DSLAMs, when the ILEC has made such capabilities available in an area:

- when a CLEC cannot practically obtain a conditioned loop to serve a customer (i.e., where a CLEC cannot access a conditioned loop using its own DSLAM)
- when a CLEC is serving a customer using the UNE-P combination and is not using its own facilities to provide voice grade service to the customer

In such cases -- and especially in the residential market where CLECs will have to rely heavily on UNE-P as a market entry strategy -- the ILEC has deployed its advanced services capabilities relying on the scope and scale of its existing monopoly network and will be able to provide their customers with a bundle of traditional and advanced services

CLECs do not have the same economies to deploy advanced service capabilities as will not be able to compete on an equal footing in such cases

- Thus, if CLECs are denied access to equipped loops, they will not be able to provide the same service options as ILECs and customers will be less likely to choose the CLEC as a service provider

Even in these cases, however, CLECs do not require access to the ILEC's data transport and data switching, except insofar as the ILEC itself has chosen to use them to enable it to deliver CLEC data traffic to the first network point where such traffic can be segregated and passed to the CLEC for processing over its own data network

ILEC claims that unbundling would reduce incentives for investment are wrong

- Indeed it is the threat of CLEC deployment of advanced services that has caused ILECs to rapidly expand their own plans to deploy advanced services
- The limited unbundling of equipped loops requested by AT&T would not change those incentives

There is also no need to require spectrum unbundling because it raises significant policy and operational issues, including

- loop pricing
- responsibility for loop testing and maintenance
- risk of freezing the development of DSL technical innovation at the current level

15. AT&T's Comments Envision a Reduction in the Number of UNEs

AT&T's comments do not seek a simple and unprincipled reinstatement of the UNEs required in the First Report; rather,

- The limiting principle AT&T proposes is fully consistent with the Act's text and underlying purposes and
- AT&T recognizes that the unbundling requirements should be adjusted over time to reflect market realities

AT&T, for example, does not seek access to standalone unbundled signaling, because alternatives are available to CLECs that have their own switches¹

AT&T also recognizes that other sources of OS/DA services are available and only seeks access to OS/DA as a UNE in cases where the ILEC does not provide the customized routing that a CLEC must have to route OS/DA traffic efficiently to its own OS/DA platform²

AT&T also does not seek access to many ILEC functionalities used to provide advanced services. In particular, AT&T does not request

- ILEC equipped loops (i.e. loops attached to DSLAMs) except when there is no practical opportunity for a CLEC to obtain access to a conditioned ("clean copper") loop or when a customer is served through the UNE-P combination for voice services
- ILEC data networking or switching even when using an equipped loop, except as necessary for the ILEC to deliver to a CLEC its customers' data traffic at the first point such traffic can be segregated in the ILEC's network

AT&T also agrees that it would be appropriate to schedule a review of the Commission's unbundling rules three years after the effective date of the rules adopted in this proceeding, to determine whether market changes have made it unnecessary to continue to require unbundling of some UNEs in some circumstances

- This type of schedule balances CLECs' need for certainty with the Commission's obligation to adjust its requirements as circumstances dictate

¹ Access to unbundled signaling is technically required, however, when a CLEC purchases unbundled switching, because even the ILECs acknowledge that a single switch can only effectively be served by one STP pair and one signaling system.

² In contrast, no source of DA information matches the ILECs', making such information indispensable if CLECs are to have an equal opportunity to compete in this area.